Peirce-Phelps, Inc.[1] ***and*** **Warehouse Employees Union, Local 169 a/w International Brotherhood of Teamsters, AFL–CIO.** Case 4–RC–20675

April 12, 2004

DECISION AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held August 15, 2003, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 2 for and 1 against the Petitioner, with 2 determinative challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings[2] and recommendations as modified below.

The Employer challenged the ballot of Michael Cammoroto on the ground that Cammoroto was not employed within the stipulated unit on the date of the election. The Petitioner challenged the ballot of Michael Panara, Jr. on the ground that Panara Junior is related to a member of management. The hearing officer recommended sustaining the challenge to Cammoroto's ballot and overruling the challenge to Panara Junior's ballot. The Petitioner has excepted to both recommendations. For the reasons discussed below, we adopt the hearing officer's recommendations.

I. THE CHALLENGE TO THE BALLOT OF MICHAEL CAMMOROTO

The Employer is a distributor of appliance electronics and heating and air conditioning equipment. It operates approximately 15 facilities, including one located on Decatur Road in Philadelphia, Pennsylvania. The employees at the Decatur Road facility fall into three primary classifications: warehousemen, store employees, and sales management representatives. Under the terms of the parties' Stipulated Election Agreement, the election at issue here was conducted in a unit consisting of "[a]ll full-time and seasonal warehousemen employed by the Employer" at its Decatur Road facility, excluding "[a]ll other employees."

One of the positions within the store employee classification is that of store driver. Michael Cammoroto became the store driver at the Decatur Road facility in March 2003.[3] When his delivery duties permitted, Cammoroto worked at the store counter or in the warehouse. On June 17 or 18, Cammoroto was transferred to a full-time warehouse position. Crediting the Employer's witnesses, the hearing officer found that this transfer was a temporary arrangement. Cammoroto was a full-time warehouseman on July 15, the payroll eligibility date for the election. On July 23, however, Cammoroto was transferred back to his store driver position. Despite his return to this position, he continued to perform a limited amount of warehouse work on irregular and infrequent occasions. As noted above, the election was held on August 15.

To be eligible to vote in a representation election, an employee must be within the proposed bargaining unit on both the established eligibility date and the date of the election. *Plymouth Towing Co.*, 178 NLRB 651 (1969). An employee who is transferred out of the bargaining unit before the election will not be eligible to vote unless he or she has a reasonable expectancy of returning to the unit. *Mrs. Baird's Bakeries*, 323 NLRB 607 (1997). There is no dispute that Cammoroto was not in a unit position on the date of the election. Further, based on credibility determinations, which we have upheld, the hearing officer found that Cammoroto did not have a reasonable expectancy of returning to the unit. However, because Cammoroto continued to perform some warehouse work after resuming his store driver position, the Petitioner argued that Cammoroto should be included in the unit as a dual function employee. The hearing officer rejected the Petitioner's dual function argument on its merits. The Employer contends that the hearing officer should not have addressed the merits of the dual function issue because the parties' Stipulated Election Agreement reflected their clear intent to exclude Cammoroto from the unit. We agree with the Employer's contention.

Where the parties to a Board election have stipulated to a bargaining unit, "the Board's function is to ascertain the intent of the parties with regard to inclusion or exclusion of a disputed voter and then to determine whether such intent is inconsistent with any statutory provision or established Board policy." *Bell Convalescent Hospital*, 337 NLRB 191 (2001). Only if the parties' intent is un-

[1] We have amended the caption to reflect the correct spelling of the Employer's name.

[2] The Petitioner has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[3] All dates are in 2003, unless otherwise indicated.

clear will the Board utilize the community-of-interest analysis to resolve the dispute. *McFarling Foods, Inc.*, 336 NLRB 1140 (2001). Where a stipulation includes certain job classifications and expressly excludes "all other employees," "[t]he Board . . . will find a clear intent to exclude those classifications not matching the stipulated bargaining unit description." *Bell Convalescent Hospital*, supra. Here, the stipulation includes "[a]ll full-time and seasonal warehousemen" and explicitly excludes "all other employees." On the date of the election, Cammoroto was a store driver, not a warehouseman. Thus, the parties' clear intent was to exclude Cammoroto from the unit. See *Bell Convalescent Hospital*, supra at 191 ("dual function" analysis not applied where parties' intent to exclude classification was clear). Further, Cammoroto's exclusion does not contravene any provision of the Act or established Board policy. Accordingly, we sustain the challenge to Cammoroto's ballot.

II. THE CHALLENGE TO THE BALLOT OF MICHAEL PANARA, JR.

At the time of the election, Michael Panara, Jr. was a 16-year-old high school student who had worked for the Employer as a warehouse employee every summer since 2001. Panara Junior is supervised by his father, Decatur Road Warehouse Manager Michael Panara, Sr. Panara Senior has no ownership interest in the Employer.

The record shows that Panara Junior performed many of the same work duties as the other Decatur Road warehouse employees. However, Pennsylvania law precludes persons younger than 18, such as Panara Junior, from operating heavy machinery, including forklifts. From late June to mid-August 2003, Panara Junior generally worked from 9 a.m. to 5 p.m., averaging 32 hours per week, slightly more than seasonal warehouseman Frederic Smith. At times, however, Panara Junior's work schedule fluctuated because of the availability of warehouse work not requiring the use of forklifts. Moreover, Panara Junior was not free to set or alter his work schedule. In fact, on at least two occasions in 2003, Panara Senior denied Panara Junior's requests to alter his schedule. Panara Junior worked under the same conditions as other warehouse employees. Like seasonal employee Smith, he earned $8 an hour. Although the duration of Panara Junior's summer employment was shorter than that of some other seasonal warehousemen, the Employer has no fixed beginning and ending dates to which seasonal employees are expected to adhere. Panara Junior was subject to the same policies as other seasonal warehousemen. Like them, he received no paid vacation, sick time, or other fringe benefits. Panara Junior never attended any management meetings or substituted for Panara Senior in the latter's absence. Based on these facts, the hearing officer rejected the Petitioner's argument that Panara Junior enjoys special benefits, as Panara Senior's son, that warrant his exclusion from the bargaining unit. The Petitioner excepts.

As explained above, in stipulated unit cases the Board resolves voter eligibility disputes by giving effect to the parties' intent as expressed in the Stipulated Election Agreement, unless that intent cannot be determined or the Board is precluded from honoring it by a provision of the Act or some established Board policy. *Bell Convalescent Hospital*, supra; *McFarling Foods*, supra. Here, the parties' stipulation unambiguously expressed their intent to include "seasonal warehousemen" such as Panara Junior within the unit. Thus, Panara Junior must be included, unless a statutory provision or established Board policy requires otherwise.

Contrary to our dissenting colleague, we find that Board policy does not mandate Panara Junior's exclusion from the unit. An employee-relative of a nonowner manager is excluded from a bargaining unit as a matter of Board policy only if that employee enjoys "specific special privileges or benefits" by virtue of the relationship. *Cumberland Farms*, 272 NLRB 336 (1984). Here, Panara Junior did not enjoy special privileges or benefits by virtue of his relationship with nonowner manager Panara Senior. As detailed above, Panara Junior never attended management meetings or assumed his father's authority. Rather, he worked under the same conditions and subject to the same policies as other seasonal warehousemen, performing similar tasks and earning a comparable wage. His duties differed from those of other warehouse employees only in that he did not perform tasks requiring the operation of heavy lifting machinery. This difference, however, was mandated by State law and did not flow from Panara Junior's relationship with Panara Senior. His exemption from the operation of heavy lifting machinery was a legal requirement, not a special benefit.

In finding that Panara Junior should be excluded from the unit, our dissenting colleague relies on *Novi American Inc.–Atlanta*, 234 NLRB 421 (1978). In that case, the Board found the comparative youth of employee-relative Mark Johnston, and the fact that Johnston was permitted to work during school vacations, to be probative of special status. However, in finding that Johnston must be excluded from the unit, the Board relied principally on the fact that, unlike other employees, Johnston was paid from the employer's "contract labor" ledger instead of its regular payroll, with the result that neither social security nor income taxes were deducted from his paycheck. *Novi American*, supra at 422. There is no such

special pay arrangement here. In addition, Johnston intended to continue working full time during the school year. That was impossible to accommodate within the employer's regular shift schedule and thus would entail creating a special shift for Johnston's "personal convenience." The evidence showed that the Employer would "almost certainly" make that adjustment. Id. Here, by contrast, Panara Junior worked within the Employer's regular shift schedule. Moreover, to the extent Panara Junior's schedule fluctuated, it was to comply with the law, not to suit Panara Junior's convenience. Indeed, more than once, Panara Senior turned down Panara Junior's requests to alter his work schedule. Not surprisingly, Panara Junior did not work when the tasks to be performed required the use of machinery he could not lawfully operate. Again, however, this flowed from constraints imposed by State law, not from his family relationship. Thus, we find *Novi American* distinguishable.

Our colleague relies heavily on the fact that Panara Junior was hired at an age when he was legally unable to operate heavy lifting machinery. However, it is clear that there are several other warehousing functions that do not require the use of such lifting equipment. As the hearing officer noted, these are the warehousing functions that Panara Junior performed while at work. These functions fully occupied him when he was at work. Consistent with that, Panara Junior was not scheduled to work on days when there were no such warehousing functions to perform. However, this was a consequence of his legal impediment rather than a function of his relationship to Panara Senior. Further, even assuming arguendo that Panara Junior would not have been *hired* but for his relationship to Panara Senior this does not gainsay the fact that, *on the job*, he performs a full day's work and receives no special treatment.

Our dissenting colleague also relies on the fact that Panara Junior lives with and is financially dependent on Panara Senior. The Board has stressed, however, that "the proper test in cases where ownership is not at issue is 'special status' *on the job*." *Cumberland Farms*, supra at 336 fn. 2 (emphasis added). Because Panara Junior enjoys no such special status, his residential and financial arrangements away from the job are insufficient in themselves to require his exclusion from the unit.

Given that no Board policy prevents Panara Junior's inclusion in the unit, the expressed intent of the parties must be given effect. Thus, we adopt the hearing officer's recommendation and overrule the challenge to Panara Junior's ballot.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 4 shall, within 14 days from the date of this Decision and Direction, open and count the ballot of Michael Panara, Jr. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

Dated, Washington, D.C. April 12, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

I agree with my colleagues in all respects except their finding that Michael Panara, Jr. does not enjoy special privileges or benefits warranting his exclusion from the bargaining unit. Panara Junior received special treatment from the very inception of his employment with the Employer. He was hired at the age of 14, and was seasonally reemployed thereafter, despite his legal incapacity to operate heavy lifting machinery—which, by Panara Senior's own admission, constitutes an important part of the warehouseman's job. While other seasonal employees have been hired to work in the Employer's warehouse notwithstanding their *inexperience* in operating heavy lifting machinery, the record discloses none except Panara Junior who have been hired in total disregard of a *legal incapacity* to operate such machinery.

To accommodate Panara Junior's peculiar limitation, Panara Senior created a fluctuating schedule specifically for Panara Junior, which ensured that Panara Junior would be in the warehouse only when there was work available that he could perform—i.e., work not involving the operation of heavy lifting machinery. Panara Senior also tailored Panara Junior's work schedule to fit his son's school year, allowing Panara Junior to work for only a portion of the Employer's peak summer season. He also permitted his son to work during other breaks in the school year.

These scheduling accommodations, as well as the mere fact of Panara Junior's employment despite his inability to perform important job functions, are highly probative of special status. See *Novi American Inc.–Atlanta*, 234 NLRB 421, 422 (1978). In *Novi American*, the Board excluded a nonowner manager's 17-year-old son from a bargaining unit based, in part, on its finding that he had received special treatment in respect to his hiring and work schedule. Id. The Board viewed the employer's hiring of the employee-relative at an unusually early age, when applicants of that age were not normally hired, as

one indication of special status. Id. The Board cited the employer's adjustment of the employee-relative's work schedule to suit his school commitments as another such indication. Id.

In one respect, the special treatment Panara Junior received in this case goes beyond that found indicative of special status in *Novi American*. Like the employee-relative in *Novi American*, Panara Junior was hired at an unusually early age. However, in *Novi American*, there is no suggestion that the employee-relative's youth prevented him from performing any job related tasks. Here, by contrast, Panara Junior's youth barred him from performing a concededly important part of the warehouseman's job. Furthermore, as in *Novi American*, Panara Junior's work schedule was adjusted to suit his personal convenience—i.e., his school schedule and age-related limitations.

In addition, Panara Junior lives with Panara Senior and therefore enjoys access to Panara Senior beyond that available to other employees. Moreover, Panara Junior is financially dependent upon Panara Senior. These facts, together with the special treatment in hiring and scheduling detailed above, warrant Panara Junior's exclusion from the bargaining unit as a matter of Board policy. See *R & D Trucking, Inc.*, 327 NLRB 531, 533 (1999) (noting employee-relative's living with and financial dependence on nonowner manager as relevant considerations in determining special status).

Despite the foregoing, my colleagues find that Panara Junior should not be excluded from the unit. They view his special scheduling treatment merely as ensuring that he would be fully occupied while at work. The concern with keeping Panara Junior fully occupied itself, however, reflects his special status. There would be no need to adjust his schedule if he were capable of performing all warehouse tasks, like the other employees. The majority also ascribes the Employer's tailoring of Panara Junior's schedule to his "legal impediment" rather than his relationship with Panara Senior. But, again, no adjustments would have been necessary had Panara Junior not been hired *despite* the impediment *because* he is Panara Senior's son.

Finally, my colleagues appear to believe that even if Panara Junior was hired because he is related to Panara Senior that is not probative of special status because "*on the job*, he performs a full day's work and receives no special treatment." In so stating, my colleagues seize on language from *Cumberland Farms* to extend that decision beyond its holding. In *Cumberland Farms*, the Board held that being related to and living with a nonowner supervisor, *without more*, is insufficient to exclude the employee-relative from the unit. *Cumberland Farms*, 272 NLRB 336 (1984). From this holding, it does not follow that where there *is* something more, the Board is precluded from considering all relevant circumstances in determining special status. Indeed, other Board decisions show that it is not so precluded. *Novi American*, supra; *R & D Trucking*, supra. Here, as I explain above, there is much more: special treatment in hiring despite an inability to perform major job tasks and special treatment in scheduling to accommodate age-related limitations and a school schedule. All of the special treatment stems from Panara Junior's relationship to Panara Senior, with whom Panara Junior lives and on whom he depends financially. All of these circumstances are relevant to the special status inquiry, and *Cumberland Farms* does not hold to the contrary.

Dated, Washington, D.C. April 12, 2004

Dennis P. Walsh, Member

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